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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of KAREN R. and MARK RUBLE.	
KAREN R. RUBLE, Respondent, v. MARK RUBLE, Appellant.	E033035 (Super.Ct.No. RFL 20267) OPINION

APPEAL from the Superior Court of San Bernardino County. Ben T. Kayashima, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Victoria L. Penley and Victoria L. Penley for Respondent.

Elizabeth F. Courtney for Appellant.

1. Introduction

Mark Ruble (father) appeals from a family court order awarding sole legal and physical custody of his two sons to their mother, Karen R. Ruble (mother). In challenging the family court's order, father raises the following argument: the court

erred in awarding sole legal and physical custody to mother; the court violated his right to practice his religion (i.e., praying for his children as their Christian Scientist Practitioner) by limiting his access to certain information concerning their prayer needs; the court erred in relying on the court-appointed experts' reports; the court abused its discretion in excluding his expert's testimony; the court erred in denying his request to appoint independent counsel for the children; the court erred in failing to impute income to mother in calculating the guideline amount; the court erred in ordering father to bear all the travel expenses for visitation; and the court erred in failing to provide him with adequate time to present his case.

We conclude that the record contains substantial evidence to support the family court's finding that sole legal and physical custody to mother was in the children's best interests. The record also revealed no violation of father's constitutional right to practice his religion because father was not a certified Christian Scientist Practitioner and the court's order in no way prevented him from otherwise praying for his children. Father's remaining arguments also find no support in the record or the law. We reject all of father's arguments and we affirm the family court's order.

2. Factual and Procedural History[1]

Mother and father were married for approximately 11 years and had two sons, David, who was born in 1993, and Scott, who was born in 1994. Both parents are Christian Scientists. During their marriage, father earned a living as a Christian Science Practitioner, which was a position in the healing ministry of the church devoted to prayer, especially for the sick.

In August of 1998, mother filed a petition for dissolution. During the initial proceedings, mother and father stipulated to a custody arrangement, in which mother and father would have joint custody, with mother having primary custody and father having visitation. Under the agreement, the parties shared the transportation costs for father's visits.

At about the same time, mother filed an application for a temporary restraining order against father based on a particular incident, during which he shoved her into the car and drove recklessly down the street. After the court granted the restraining order, father lost his certification as a Christian Science Practitioner as a result of mother's allegations.

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[1] Numerous items were missing from the clerk's transcript, as designated by father in this appeal. As a result of the missing items, the record fails to provide a full and accurate view of the procedural facts. Rather than the actual documents, such as mother's original petition for dissolution, we have cited to the court's final statement of decision (hereafter SD), which also was omitted from the clerk's transcript, but later was added in response to father's motion to augment the record. It is the appellant's burden to provide an adequate record for review. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

[footnote continued on next page]

The court granted mother's petition for dissolution in January of 1999. The judgment included the terms of the parties' agreement.

Upon dissolution, mother moved to her mother's house in Colorado with the children. Although she resided in Colorado, mother continued to provide father with information concerning the children's health, education, and activities. In Colorado, mother worked part-time and attended school to obtain a master's degree.

Even after their move to Colorado, mother continued to fear for her safety based of father's conduct during his visits. According to mother, father also used profanity in his conversations with her in front of the children.

In May of 1999, father filed a motion to set aside the judgment, including the court's custody and visitation orders. Father's motion was granted. Despite the court's decision, the parties continued to follow the prior stipulated agreement.

Mother later discovered that, during the children's visits to California, father was making certain decisions for the children without her consent. For example, in the spring and summer of 2000, father placed the children in therapy with Ruth Deich. During a phone conversation, Deich informed mother that the children had no psychological problems. After mother discovered that the children were attending therapy, she told the therapist to discontinue treatment unless she had consent from both parents.

Father also took the children to an optometrist and an orthodontist without mother's knowledge or consent. Father, who did not provide mother with any medical

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[footnote continued from previous page]

insurance for the children, asked mother to pay for half of the costs for these additional medical expenses.

In 2002, mother reinitiated the proceedings to allow the court to address the unresolved custody issues. During the proceedings, the court appointed two psychologists to examine the children and the parents. One of the psychologists, Robert Suiter, based on his 1999 evaluations, reported that father's complaints concerning mother were excessive, beyond what he had observed with other divorced couples. At that time, Suiter recommended that the court award mother primary custody of the children. After his reevaluation in 2002, Suiter concluded that father continued to be overly critical of mother and her parenting skills. His reevaluation, however, revealed no indication that mother provided the children with less than adequate care. Suiter again recommended joint legal and physical custody, with primary custody with mother.

The other court-appointed psychologist, Patricia Marzicola, conducted her interviews with the parents and the children in 2001. Marzicola also noted that father was overly critical of mother, both personally and as a parent. Marzicola reported that father often made decisions without consulting mother or contrary to their prior agreement. In regards to the particular incident when father took the children to psychotherapy without mother's knowledge, Marzicola noted that the children were not in need of such treatment. Marzicola also recommended that mother be given primary custody of the children.

The court rendered its judgment on November 15, 2002, and issued its statement of decision on September 27, 2002. The family court awarded mother sole legal and physical custody of the children. The family court ordered visitation for father. The court ordered father to bear all the travel expenses for visitation. The court also specifically ordered mother to provide father with "any and all information as it pertains to the medical status of the children on an as needed basis solely in the opinion of the Petitioner/Mother." Based on father's reduced income, the court reduced the amount of child support from $951 to $561 per month for both children.

3. Substantial Evidence Supports Court's Order

Father claims the family court erred in giving mother sole legal and physical custody of the children. Under a separate heading, father also argues that the court erred in making this order because mother failed to request sole legal and physical custody until her closing argument.

During her closing argument, mother's counsel argued that the experts' evaluations supported not only primary custody, but also sole legal and physical custody. Father, who requested sole legal and physical custody for himself, objected to mother's late request. The court, in response, stated that it was entitled to fashion any order that was based on the evidence and consistent with the children's best interests.

Under Family Code section 3040[2], the court has wide discretion to select a parenting plan that comports with the child's best interest. "A custody determination must be based upon a true assessment of the emotional bonds between parent and child, upon an inquiry into 'the heart of the parent-child relationship . . . the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond.' [Citation.] It must reflect also a factual determination of how best to provide continuity of attention, nurturing, and care."[3] The court's factual determinations are reviewed under the substantial evidence test,[4] while the court's child custody order is reviewed under the deferential abuse of discretion standard.[5]

Sole legal custody entails one parent having the right and responsibility to make all the decisions relating to the child's health, education, and welfare.[6] Sole physical custody means that the child will live with and be supervised by one parent. The court, however, may order visitation for the other parent.[7]

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[2] All further statutory references will be to the Family Code unless otherwise specified.

[3] *Burchard v. Garay* (1986) 42 Cal.3d 531, 540.

[4] See *In re Marriage of Lewin* (1986) 186 Cal.App.3d 1482, 1491-1492.

[5] *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.

[6] Section 3006.

[7] Section 3007.

In this case, the court found that it was in the children's best interest to give mother sole legal and physical custody. The court also found that father made inappropriate decisions, including enrolling the children in school during their summer vacation and taking the children to a psychotherapist, without mother's prior notice and consent. The court found that, while parents attempted to comply with their prior stipulated agreement for the past three years, their communications during that time were excessive and often contentious. During the hearing, the court indicated that the existing agreement of joint legal and physical custody was not working, and, therefore, a change was necessary. The court apparently concluded that one parent should have sole custody of the children. The court found that, while mother was more likely to allow father to have frequent and continuing contact with the children, primary custody with father would greatly jeopardize the children's relationship with their mother.

Substantial evidence supported the court's factual findings. The record shows that father made unilateral decisions concerning the children's education and health. Father testified that he enrolled the children in school during their summer vacation. Father also testified that he scheduled appointments for the children to see a psychotherapist, Ruth Deich, as often as two to three times a week. Mother testified that father made decisions regarding the children's health without obtaining her prior consent or approval.

Both experts testified that father's attitude toward mother detrimentally affected the children's relationship with both parents. In recommending against placement with father, Suiter noted father's "extreme disdain that he evidenced for Ms. Ruble, that he

had such a near infinite list of complaints about her, regarding virtually every aspect of her appearance and behavior and moods, ability to care for herself and the children in the home, that I considered there was no reasonable likelihood that with such a negative opinion of her that he could support the relationship of the boys with her." In his report, Marzicola also recognized that father's utter disdain for mother could ultimately affect the boys. According to Marzicola, none of father's complaints concerning mother surfaced during his observations.

Both experts also noticed that father and mother often were unable to agree on matters involving their children. Suiter observed, "I do not consider that [father] has any reasonable ability to co-parent with [mother] with the boys." Suiter also noted that father "would be relatively more inclined to use his joint legal custody in a manner to undermine Ms. Ruble's decisions with the boys." Marzicola also indicated that father sometimes disregarded mother's decisions or undermined her authority.

In the experts' opinion, mother provided the children with adequate care. Marzicola made the following observations concerning mother: "She's organized; she was taking them to their sports and music lessons; she was sharing parenting child care with other mother's; she was attending some of the school functions and volunteering as a mother." As for father's parenting methods, Marzicola noted that most health professionals recommend that the children should not be in school during their vacations. Father, however, placed the children in school during the summer and their one-week spring break. Marzicola also observed that father did not involve the children in

extracurricular activities, including sports and music lessons. Both experts recommended primary custody with mother.

Based on this evidence, the court acted well within its discretion in giving sole legal and physical custody to mother. The experts' testimony indicated that father failed to cooperate with mother in making decisions concerning the children's health, education, and welfare. The court reasonably found that the children needed a single decision-making authority. Based on father's hostility toward mother, the court also reasonably found that mother was best able to make decisions that would not have a detrimental effect on the children's relationship with both parents.[8] We conclude, therefore, that the family court did not abuse its discretion in ordering mother to have sole legal and physical custody of the children.

Father nevertheless contends the court erred because mother failed to request sole custody until closing argument. The court, however, is not required to select one of the alternatives provided by the parties.[9] Even if mother made no request for sole custody throughout the proceedings, the court's order, so long as it is supported by substantial evidence, must stand.

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[8] See *In re Marriage of Abargil* (2003) 106 Cal.App.4th 1294, 1299.

[9] See *In re Marriage of Neal* (1979) 92 Cal.App.3d 834, 839.

Furthermore, father's contention is based on the unsupported premise that the prior child custody arrangement was successful. As found by the court, the prior arrangement proved to be unworkable.

In any event, the family court's order included the same terms of visitation as in the parties' earlier stipulated agreement. From the children's perspective, therefore, the court's order would not amount to any significant changes with regard to the time spent with each parent. Additionally, the court found that mother was more likely to encourage contact between father and the children. The record indicates that mother allowed father to have additional or extended visits with the children, beyond the terms of the earlier agreement. The court's order furthers the children's interest in maintaining stable custodial and emotional ties with both parents.[10]

Because the court reasonably concluded that the children's best interests were served by giving mother sole legal custody, we must uphold the court's order.[11]

4. No Violation of Free Exercise

Father claims, however, that the court's order violated his right to exercise his religion in that the court prevented him from having access to information necessary for him to perform his role as the children's Christian Science Practitioner.

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[10] See section 3020, subdivision (b); *Burchard v. Garay, supra,* 42 Cal.3d at page 536; *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 794.

[11] *In re Marriage of Bryant, supra*, 91 Cal.App.4th at page 793.

The First Amendment of the United States Constitution and article I, section 4 of the California Constitution bars the state from prohibiting the free exercise of religion. While an individual may practice his religion, his conduct remains subject to reasonable state regulation to protect state or societal interests.[12] To establish a First Amendment violation, the individual must show that the state action substantially burdened the practice of his religion.[13] Once the individual makes this threshold showing, the court must balance the gravity of the state's interest against the severity of the religious imposition.[14]

Father has failed to make the threshold showing that the court's order substantially burdened his right to exercise his faith. Father appears to argue that the court's order giving mother sole legal custody cuts off his access to information concerning his sons' health and welfare. The modification from joint to sole legal custody primarily changed mother's rights and responsibilities in making decisions concerning the children.[15] The modification, however, had no direct effect on father's access to information. In this

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[12] *Walker v. Superior Court* (1988) 47 Cal.3d 112, 139.

[13] *Smith v. Fair Employment & Housing Com*. (1996) 12 Cal.4th 1143, 1181; *DiLoreto v. Board of Education* (1999) 74 Cal.App.4th 267, 278-279.

[14] *Walker v. Superior Court, supra*, 47 Cal.3d at page 139, citing *Wisconsin v. Yoder* (1972) 406 U.S. 205, 221.

[15] Section 3006.

case, the court specifically ordered mother to provide father with any and all information pertaining to the children's health as she finds necessary.

In effect, while the court's order prevented the father from receiving information concerning every minor incident, such as when a child scrapes his knee, the court's order does not deprive him of any significant information concerning his children's health. In the past, while mother notified father as to many of these minor incidents, she was not under any duty to do so based on the prior joint custody agreement. One of the court-appointed psychologists noted that mother and father's communication, usually by fax, was unusually excessive. When asked about the level of communication between the divorced couple, the psychologist made the following comments: ". . . their correspondence I must say has been excessive. It's unbelievable. I've never had a case . . . where there has been this incredibly detailed obsessive-compulsive type communication back and forth. Usually one parent trusts the other one to take necessary procedures and steps and carry through with them." While father may argue that such communication was necessary to keep him informed concerning his children so that he could pray for them, by changing the joint custody arrangement, the court was not taking away any right that father was entitled to in the first instance.

Furthermore, the court's order did not substantially burden father's ability to pray for his children's health. We note that, by the time of the hearing, father had lost his certification as a Christian Science Practitioner. Thus, even assuming that a Christian Science Practitioner required minute details concerning an individual in order to pray

effectively for that person, father was not authorized by his church to administer such treatment. As mother testified at trial, she had hired a certified Christian Science Practitioner to serve the children's needs.

Otherwise, nothing in the court's order prevented father from praying for his children as a concerned parent or spiritual leader of his family. While he may not have immediate access to every detail concerning his children's lives, no parent can expect such information regardless of whether one parent enjoys sole custody or both parents share joint custody.

Moreover, custody decisions will not be governed by a parent's religious beliefs or practices absent a clear showing of harm to the children.[16] The court is not required to fashion an order to provide father with information concerning every detail of his children's lives. The court's order essentially required mother to provide father with information concerning the more serious incidents, in other words, incidents that would affect the child's health and welfare. It would be impractical for the court to require mother to provide information to father concerning the children's every cut and scrape. One court indicated that there must be sufficient evidence of harm beyond a parent's distress and a child's simple aches or pains.[17] Therefore, father's desire to know every detail of his children's lives, while commendable in demonstrating his concern for his

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[16] *In re Marriage of Murga* (1980) 103 Cal.App.3d 498, 505.

[17] *In re Marriage of Mentry* (1983) 142 Cal.App.3d 260, 266.

children and his commitment to his faith, cannot dictate how the court should fashion its custody order.

We conclude that father has failed to demonstrate that the court's order substantially burdened his right to exercise his religion.

5. Court-Appointed Experts' Reports

Father claims the family court erred in relying on the court-appointed experts' reports in making its orders.

Section 3111 provides that, upon the court's direction, the court-appointed evaluator must investigate the custody issues and prepare a confidential report.[18] Section 3111 also provides that the court may admit the report into evidence upon the parties' stipulation.[19]

In this case, father's attorney objected to admission of the experts' reports. The court, therefore, asked mother's attorney to call the experts to testify at trial to provide evidence to support her custody recommendation.

The statute allows the court to consider the report.[20] In taking the report into consideration when making its custody determination, the court, in the exercise of its discretion, either may reject the observations and opinions contained in the report or may

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[18] Section 3111, subdivision (a).

[19] Section 3111, subdivision (c).

[20] Section 3111, subdivision (a).

use them in reaching its own factual conclusions.[21] One court observed, ". . . the investigation and subsequent report of the court investigator were made pursuant to stipulation of the parties, and it is but reasonable and natural to assume that it was contemplated and intended that such report should be used at the hearing. Otherwise, for what purpose was it stipulated that the investigation might be made and the report rendered?"[22]

Furthermore, while the court quoted from the experts' report, the court also made reference to the experts' trial testimony. Robert Suiter and Patricia Marzicola's testimony confirmed the relevant observations and conclusions made in their reports. The court's comments, therefore, "very clearly show that [it] acted upon the evidence, and not solely on the report[s]."[23]

Even if the court erred by quoting from the experts' report, father cannot demonstrate any prejudice.[24] Suiter and Marzicola both testified at trial and provided evidence consistent with the statements used by the court in making its findings. Additionally, in requiring mother to present evidence in the form of live testimony, the

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[21] See *Prouty v. Prouty* (1940) 16 Cal.2d 190, 195; *Noon v. Noon* (1948) 84 Cal.App.2d 374, 383.

[22] *Noon v. Noon, supra*, 84 Cal.App.2d at page 383.

[23] See *Biles v. Biles* (1951) 107 Cal.App.2d 200, 203.

[24] See *Bialac v. Bialac* (1966) 240 Cal.App.2d 940, 947.

court afforded father every opportunity to hear the evidence and cross-examine the witnesses.[25]

We conclude that, because Suiter and Marzicola testified at trial, the court did not abuse its discretion in adopting the observations and opinions made by the experts in their reports.

6. Father's Expert

Father claims the family court abused its discretion in excluding the testimony of his expert, Ruth Deich, based on mother's refusal to waive the psychotherapist-patient privilege. Father argues that, because both parents shared joint custody of the children, either parent should have had the right to waive the privilege.

Evidence Code sections 1010-1027 set forth the definitions and rules governing the psychotherapist-patient privilege. The privilege protects the privacy of a patient's confidential communications with his psychotherapist.[26] Generally, a living patient holds the privilege (i.e., has the right to waive the privilege) unless the patient has a guardian or conservator.[27] If the holder claims the privilege or if an authorized person

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[25] See *Forslund v. Forslund* (1964) 225 Cal.App.2d 476, 495; *Fewel v. Fewel* (1943) 23 Cal.2d 431, 436.

[26] *In re Daniel C. H.* (1990) 220 Cal.App.3d 814, 826.

[27] Evidence Code sections 912 and 1013; see also *Mavroudis v. Superior Court* (1980) 102 Cal.App.3d 594, 602.

claims the privilege, he or she may prevent another from disclosing confidential communications.[28]

Children have the right to the privacy afforded by the psychotherapist-patient privilege.[29] Under certain circumstances, parents may assert the privilege on behalf of their children. For instance, parents may serve as the child's guardian.[30] However, we are mindful that the term "guardian" has a particular meaning in the law.[31] Even in the absence of legal guardianship, certain individuals, including parents, attorneys, and social workers, may be authorized to claim the privilege on behalf of the child.[32] For all practical purposes, when the child is too young to claim the privilege, the parents, who have the rights and responsibilities associated with having legal custody of the child, may assert the privilege on behalf of the child so long as their interests are not in conflict with those of the child.[33]

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[28] Evidence Code section 1014.

[29] See *In re Daniel C. H., supra*, 220 Cal.App.3d at pages 826 and 829.

[30] Evidence Code section 1013.

[31] See *In re Fred J.* (1979) 89 Cal.App.3d 168, 185 (conc. & dis. opn. of Karlton, J.).

[32] See Evidence Code section 1014; *In re Daniel C. H., supra*, 220 Cal.App.3d at page 829; *In re Fred J., supra,* 89 Cal.App.3d at page 185 (conc. & dis. opn. of Karlton, J.) (suggesting mother held privilege until court-appointed counsel as children's representative); see also *In re Troy D.* (1989) 215 Cal.App.3d 889, 900-901.

[footnote continued on next page]

As stated earlier, when the parents have joint legal custody, they share decision-making authority over the child's health, education, and welfare.[34] Evidence Code section 912, subdivision (b), provides in part: "Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (domestic violence victim-counselor privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege."

In this situation, both parents hold the privilege on behalf of their children as their parents-guardians. In applying Evidence Code section 912, subdivision (b), father's waiver of his right does not affect mother's right to claim the privilege.

Mother's refusal to consent to the disclosure of the confidential communications between her children and the psychotherapist bars father from presenting the psychotherapist's testimony at trial. Accordingly, the court properly excluded Deich's testimony.

[footnote continued from previous page]

[33] See *In re Troy D., supra*, 215 Cal.App.3d at page 900.

[34] Section 3002; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 29, footnote 2.

7. Appointed Counsel for Children

Father claims the family court erred in denying his request to appoint independent counsel for the children or, alternatively, to order the children to appear in court to testify.

Section 3150 provides: "(a) If the court determines that it would be in the best interest of the minor child, the court may appoint private counsel to represent the interests of the child in a custody or visitation proceeding." This statute gives the court wide discretion in determining whether such representation would be in the child's best interest.[35]

The Appendix to the California Rules of Court, section 20.5 sets forth several factors for the court to consider in exercising its discretion under section 3150. One of the factors the court takes into consideration is the likelihood that the appointed attorney would be able to provide additional, noncumulative information. Another factor is whether special representation is necessary to serve the child's best interests.

Father contends that the appointment of independent counsel would have allowed the children to assert their rights and preferences. While appointed counsel may have been able to inform the court of the children's preferences, the court is not required to base its decision on the preferences of children, who, because of their age, may be

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[35] See *Guardianship of Elan E.* (2000) 85 Cal.App.4th 998, 1002.

incapable of discerning what would be best for them.[36] Also, father fails to establish how the children's rights and interests were not considered and protected during the proceedings. While the parents may have been at odds with each other, nothing in the record indicates that they neglected the children's needs or were not seeking a custody arrangement they believed would best serve the children's interests.

While the children may have derived some benefit from independent representation during the proceedings, such assistance was not necessary to ensure a fair assessment of the children's needs and interests. We conclude that the family court acted well within its discretion in denying father's request.

8. Imputed Income

Father claims the family court erred in failing to assign to wife an imputed income in calculating the amount of child support.

Mother testified that, during their marriage, she worked as an administrative assistant at the Claremont Christian Science Church. After her move to Colorado, mother attended school to obtain her master's degree and worked part-time as a database consultant. Mother worked about 10 hours a week, earning under $500 a month.

Later during the proceedings, father requested that the court impute to mother a minimum wage income because, while mother was capable of working, she opted to further her education. The court, however, rejected father's request on the ground that

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[36] See *Shaw v. Shaw* (1962) 204 Cal.App.2d 210, 215.

mother's efforts to earn her master's degree to increase her future employment opportunities were in the children's best interests.

The court's decision comported with the statewide uniform guideline[37] and constituted a reasonable exercise of its discretion under section 4058, subdivision (b). The guideline requires that the court takes into account each parent's actual income and level of responsibility in determining the parent's child support obligation.[38] The guidelines also require that each parent pay child support based on his or her ability.[39] While the court must adhere to the guideline requirements, the statute gives the court some discretion in determining the parents' incomes. Section 4058, subdivision (b), provides: "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."

The court's application of this provision is no longer limited to situations where the parent acted in bad faith by deliberately shirking his or her responsibility to seek and maintain gainful employment.[40] "'While deliberate avoidance of family responsibilities is a significant factor in the decision to consider earning capacity [citation], the statute

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[37] Section 4050 et seq.

[38] Section 4053, subdivision (c).

[39] Section 4053, subdivision (d).

[40] *In re Marriage of Smith* (2001) 90 Cal.App.4th 74, 81.

explicitly authorizes consideration of earning capacity in all cases,' consistent with the child's best interests. [Citations.]"[41]

Despite the greater scope of its application, the meaning of "earning capacity" remains the same. "'Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire. [Citations.] [¶] . . . When the ability to work or the opportunity to work is lacking, earning capacity is absent and application of the standard is inappropriate. When the payor is *unwilling* to pay and the other two factors are present, the court may apply the earnings capacity standard to deter the shirking of one's family obligations.' [Citation.]"[42]

The court may not impute income to a parent when the parent has no earning capacity or when doing so would not serve the children's best interests.[43] Otherwise, the court, in the exercise of its discretion, may consider earning capacity.[44] The court's

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[41] *In re Marriage of Smith, supra*, 90 Cal.App.4th at page 81.

[42] *In re Marriage of Smith, supra*, 90 Cal.App.4th at page 82, quoting *In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 1372-1373.

[43] *In re Marriage of Smith, supra*, 90 Cal.App.4th at page 82.

[44] Section 4058, subdivision (b).

decision to rely on a parent's earning capacity in determining the amount of child support is reviewed for an abuse of discretion.[45]

Here, the court found that mother's educational goals enhanced her ability to find meaningful employment. Mother had the ability and opportunity to work. Mother, however, decided to go back to school and earn her master's degree. Nothing in the record suggests that mother was attempting to avoid her obligation to support her children financially.[46] At the time of the trial, mother expected to graduate by the end of the next academic quarter. The court reasonably assumed that, after graduation, mother would be able to obtain full-time employment. Therefore, while mother's education goals prevented her from obtaining full-time employment at the time, the court reasonably found that mother's anticipated increase in earning power served the children's interests in the long run.

We conclude that the family court did not abuse its discretion in denying father's request to impute a minimum wage income to mother in calculating the amount of his child support obligation.

9. Visitation Costs

Father claims the family court erred in failing to divide the costs of transportation for father's visits equally between the parties.

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[45] *In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1383.

[46] See *In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1339.

Although the court awarded mother sole legal and physical custody, it provided father with liberal visitation in California and Colorado. The court ordered father to bear the transportation costs for the visitation.

Despite the highly regulated nature of the law governing child support cases, the court retains discretion in certain areas to achieve fairness and equity.[47] One such area deals with the additional expenses anticipated in effectuating the court's order.[48] These expenses are imposed in addition to the guideline amount.[49] Such additional expenses include the costs of travel. Section 4062 allows the court to order a parent to pay the travel expenses for visitation as additional child support.[50] The court's decision to order a parent to bear the costs of travel is reviewed for an abuse of discretion.[51]

We discern no abuse of discretion. While neither parent may have been able to afford these additional costs, someone had to pay them. Father was, by far, the higher wage earner. Father again argues that the court should have imputed income to mother in determining her share of the travel expenses. As discussed in the previous section, the court did not abuse its discretion in considering mother's actual income as opposed to her

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[47] *In re Marriage of Lusby* (1998) 64 Cal.App.4th 459, 470.

[48] See section 4062 et seq.

[49] *In re Marriage of Gigliotti* (1995) 33 Cal.App.4th 518, 529.

[50] Section 4062, subdivision (b)(2).

[51] See *In re Marriage of Lusby, supra*, 64 Cal.App.4th at page 472.

earning capacity. Thus, in light of mother's actual income, the court reasonably ordered the higher wage earner, who would be incurring most if not all of the costs of travel, to cover these costs.

Furthermore, as mother noted, the revised calculations resulted in a significant reduction in child support from $951 to $561 per month for both children. Based on the reduction in support, the court may have concluded that ordering father to bear the costs of all the travel expenses would serve the goals of fairness and equity.

The court did not abuse its discretion in ordering father to pay the travel expenses for visitation.

10. Father's Case

Father claims the family court erred in failing to provide him with adequate time to present his case at trial.

A trial court has inherent power to manage its calendar and control the proceedings before it.[52] The court's exercise of this power must be upheld on appeal absent an abuse of discretion.[53]

We discern no abuse of discretion. The court reasonably limited the trial to seven days, which afforded the parties adequate time to present their evidence.

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[52] *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.

[53] *People v. Alvarez* (1996) 14 Cal.4th 155, 209.

Moreover, father fails to show that the court abused its inherent authority by preventing him from presenting any admissible evidence. Father only makes vague references to the reporter's transcript, including those dealing with Ruth Deich's testimony, father's attorney's requests for a continuance to secure another prospective expert witness, mother's attorney's comments concerning a scheduling conflict, and the court's responses and rulings in regards to its calendar. Apart from his bare citations to the record, father does not present adequate argument or authority to support his claim. Father's claim fails for this reason alone.[54]

Even on its merits, father fails to show that the court abused its discretion in managing its calendar and making efficient use of judicial resources. For example, on the sixth day of trial, father's attorney informed the court that she expected to present four additional witnesses who would provide brief testimony on letters discussed during the experts' testimony. Although the court was willing to hear the testimony, mother's attorney offered to stipulate to the admission of the letters in lieu of the testimony. The parties and the court agreed to this solution. The record, therefore, fails to show that the court acted unreasonably in accepting the parties' stipulation concerning this evidence.

As the above example demonstrates, the family court properly exercised its inherent authority to control the proceedings before it.

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[54] *People v. Earp* (1999) 20 Cal.4th 826, 881.

12. Disposition

We affirm the family court's order. Mother, as the prevailing party, shall recover her costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/McKinster
J.